CHONG THIAN FOOK & ORS

v.

SARAWAK SHELL BHD & ORS

HIGH COURT SABAH & SARAWAK, MIRI
ABDUL AZIZ ABDUL RAHIM JC
[SUIT NO: 22-69-2002 (MR)]
29 MARCH 2004

LABOUR LAW: *Provident fund - Contributory and non-contributory funds - Injunction to restrain payment out of provident funds pending action - Whether funds subject matter of pending action - Whether receiver to be appointed to safeguard amount claimed - Rules of the High Court 1980, O. 29 rr. 1, 2 & O. 30*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Application to restrain payment out of provident funds pending action - Triable issues - Whether proved - Rules of the High Court 1980, O. 29 rr. 1, 2 & O. 30*

CIVIL PROCEDURE: *Interim preservation of property - Application to safeguard money claimed in provident funds pending action - Whether funds subject matter of pending action - Whether money in danger of being dissipated - Rules of the High Court 1980, O. 29 rr. 1, 2 & O. 30*

CIVIL PROCEDURE: *Receiver - Application for receiver and injunction - Injunction to restrain payment out of provident funds pending action - Whether receiver to be appointed to safeguard amount claimed - Rules of the High Court 1980, O. 29 rr. 1, 2 & O. 30*

The plaintiffs were former employees of D1 and D2. They were members of two provident funds, contributory and non-contributory, set up by D1 and D2 *vide* two trust deeds. These funds provided for retirement benefits and were managed by a board of trustees. The plaintiffs were also members of the statutory Employees Provident Fund ('EPF'). The plaintiffs claimed that upon retirement they were not given the full amount of the benefits they were entitled to. This was allegedly due to unauthorized deductions under the trust deeds that ran contrary to the EPF Acts of 1951 (repealed) and 1991. The plaintiffs now applied for an injunction under O. 26 r. 2 of the Rules of the High Court 1980 ('RHC') because D1 and D2 were about to close the funds and pay out money therein to its current members in disregard of their claim. They also prayed for the appointment of a receiver to safeguard the amount claimed which allegedly was RM50 million.

Held (allowing the application):

[1] There were serious issues to be tried. The issues involved the question of interpretation and construction of various clauses in the trust deeds and their regulations and also the manner in which the deductions were undertaken. There was also the issue pertaining to the validity of the relevant regulations of the trust deeds as against the EPF Act 1991 and its predecessor 1951 Act. (p 620 c)

[2] There was no doubt that D1 and D2 would be able to meet their obligations to pay the plaintiffs if the plaintiffs succeeded in their claim. The sum of RM50 million claimed by the plaintiffs as compared to D1 and D2's audited annual income was a small sum. Nevertheless, the plaintiffs were claiming against the funds and the trustees. The trustees had no control or authority over funds which had not been paid into the funds and that were still in the hands of D1 and D2. Therefore, it was the assets within the funds that mattered. (p 620 d-e)

[3] D1 and D2 were reluctant to give full disclosure of the true state of assets and liabilities of the funds. The plaintiffs were entitled to such information by virtue of cl. 30(1) and cl. 31(1) of the trust deeds. If there was a shortfall to pay the said benefits then the trustees should approach D1 and D2 to remedy it as the trust deeds were entered between D1, D2 and the trustees. (p 620 h)

[4] The court may appoint a receiver to give effect to the injunction. However, the receiver would not have the same power and authority as the trustees in managing the amount of money to be set aside for the purpose of the plaintiffs' claim. It was the trustees that were entrusted with the duty of determining who were the members entitled to receive the retirement benefits from the funds as well as to ascertain the amount of the entitlement and distribute them accordingly. The receiver was not required to do all these at least not until the plaintiffs had successfully proved their case. (p 621 a-c)

[5] Although payment out to current members upon closure was allowed under the trust deeds and therefore could not amount to dissipation but once the funds were paid out there would be nothing left for the plaintiffs to claim. The plaintiffs' only request was that RM50 million be kept in the funds to meet their claim. The fact that there was no proper account made available either to the court or to the plaintiffs made it difficult for the court to evaluate the extent the defendants would be oppressed by the grant of the injunction. (p 621 f-h)

[6] There would be no loss or damage to D1 and D2. The sum of RM50 million would be kept in an interest bearing account. In the event the plaintiffs failed in this suit, the money together with the interest shall be credited back to D1 and D2 to be disposed of in any manner they wished according to the terms of the trust deeds. (p 622 a)

Case(s) referred to:
Cummins v. Perkins [1899] 1 Ch 16 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 29 rr. 1, 2, O. 30

For the plaintiffs - Cyrus Das (Gabriel Kok); M/s Khoo & Co
For the defendants - Robert Lazar (Jimmy HT Wee); M/s Jimmy HT Wee & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Abdul Rahim JC:

Finding

This is an application under O. 29 r. 1 & 2 & O. 30 of RHC 1980. Order 29 r. 1 is for injunction generally. Order 29 r. 2 is specific ie, for preservation of property the subject matter of a cause or matter.

The plaintiffs claimed that they were former employees of D1 & D2. At the material times also plaintiffs were members of SSS-RBF and SSS-PF (the funds) set up by D1 & D2 *vide* trust deeds (exh. A & B in plaintiffs' supporting affidavit). These funds are domestic retirement funds/provident funds of D1 & D2. At the material times also plaintiffs were members of the statutory EPF. The plaintiffs claimed that upon setting up, the funds were managed and administered by a Board of Trustees (trustees) – the current trustees are defendants 3-9 (with the exception of D4, against whom the action has been discontinued) and they are being sued in that capacity.

The background to the establishment of the funds is given in para 7 of plaintiffs' statement of claim. From the material facts pleaded in statement of claim it seems that the funds in question were established by two trust deeds – namely the 1968 deed and the 1976 deed. The 1976 deed was revised in 1993 and 1996 (see paras 12, 13, 14, 15 and 16 of plaintiffs' statement of claim). Looking at the two trust deeds, I found that the fund that was established under the 1968 deed is a contributory fund, but the fund established under the 1976 deed is a non-contributory fund.

Plaintiffs' claimed that the funds were created to provide for retirement benefits of the employees of D1 & D2. Therefore, in para 18 of statement of claim the plaintiffs said they have legitimate expectation towards the funds. However the plaintiffs claimed, in paras 18-22, that when they were paid their retirement benefits under the funds upon their retirement they were short changed by D1 & D2 and the trustees in that they were not paid the full amount of the benefits they were entitled to from the funds. The plaintiffs alleged that this happened because D1 & D2 had made unauthorised deductions pursuant to cl. 7 of the trust deeds. In particular the plaintiffs claimed that these deductions, were deductions related to the EPF contributions made by D1 & D2 for the plaintiffs and the interest/dividends declared by EPF as to deductions.

The plaintiffs thus claimed that such deductions are illegal, null and void and contravenes the provisions of the EPF Act 1951 and the EPF Act 1991 and seek declaration that rr. 5(2) & 7(1)(C) of the 1976 Deed were *ultra vires* the Act.

The gist of the plaintiffs' claim therefore is this: D1 & D2 and the trustees had wrongfully made deductions from their retirement benefits entitlement under the funds, which are trust funds, when making payment under the funds upon the plaintiffs' retirement. Therefore the plaintiffs have a right to the sum that had been wrongfully deducted and still lying in the funds. Therefore the plaintiffs said that since the defendants are challenging the plaintiffs' interpretation as to the manner the deductions are done, the funds should be preserved, so that in the event the plaintiffs' claim is successful, then the plaintiffs can enforce it against the funds and the trustees.

The plaintiffs are making this application under O. 29 r. 2 because it has come to the plaintiffs' knowledge that D1 & D2 are about to close the funds and pay out the money in the funds to the current members. In so doing, according to the plaintiffs, D1 & D2 have not taken into account the plaintiffs' claim, although the claim was forwarded to D1 & D2 as early as 29 November 2002.

Order 29 r. 2 is a special case of injunction in that it is preservation of property – the subject matter of the litigation. In this case the plaintiffs have shown that the funds are the subject matter of their claim. It is a specific property. Therefore I think the application is rightly made under O. 29 r. 2.

The plaintiffs also have shown that D1 & D2 are not giving any regard to the plaintiffs' claim against the funds when D1 & D2 expressed their intention to close the funds. This fact is not denied by the defendants.

In deciding this application, the court need not go into the merits of the plaintiffs' claim or the defendants' defence. The law on this point is settled. The court has only to be satisfied that there are serious questions – either fact or law – to be tried. If there is such a question then the court will have to consider – on the balance of convenience – whether or not to grant the application sought; the remedy being an equitable remedy. To tip the scale of justice, on the balance of convenience, the court would have to consider several factors:

1) The hardship it will cause to the plaintiffs if the application is refused and to weigh this against the hardship it will cause to the defendants if the application is allowed.

2) Whether an undertaking by defendants (in this case by D1 & D2) to meet the plaintiffs' claim if it is successful is sufficient to refuse the application in this instant case.

3) Whether the defendants, are in a position, financially to meet its undertaking and satisfy the judgment in favour of the plaintiffs.

Plaintiffs argued that if the defendants are allowed to proceed with the closure of the funds without setting aside the sum claimed by the plaintiffs, the plaintiffs if successful will only get a barren judgment: because by then the funds would have been fully distributed and the trustees discharged. Plaintiffs said under reg. 30(1) – exh. A – 1968 deed (Note: Reg. 3 of 1968 deed – two category of members – contributing and non contributing members) – only refers to the rights of members against the trustee and the fund. Similar provision is found in cl. 31(1) of exh. B – 1976 deed. (Note – 1976 deed – is non contributory fund). Therefore learned counsel for plaintiffs submitted that it is necessary to maintain the *status quo*.

Defendants' reply to this agreement is 2 fold – 1) that the worry by the plaintiffs is misplaced. D1 & D2 were and are in fact the contributory to the funds and that D1 & D2 will meet all obligations under any judgment if the plaintiffs are successful in their claim; 2) that the defendants (ie, D1 & D2) are not $2 companies. D1 & D2 have a long and illustrious presence in Malaysia for decades and of very good reputation at meeting their obligations. The defendants also argued that if the application is granted then the current members will not get paid from the funds if the defendants are to proceed with the closure. Another argument by defendants in resisting the application is that the application is akin to a Mareva injunction and if so, it fails to meet the test of a Mareva injunction and therefore should not be granted.

The plaintiff also prayed in this application for appointment of a receiver to safeguard the amount that is to be preserved in the funds. In response to this prayer defendants' counsel referred to a passage in *Lewin On Trust* (2000 Edn.) at p. 1185 which says that the court may appoint receiver only where it is shown that the trustee is insolvent or a bankrupt or of bad character; and none of these apply to the trustees in this case. The defendants' counsel submitted that the purpose of the injunction is not to make plaintiffs a secured creditor.

On the question whether there are serious issues to be tried, I have no hesitation to say that there are. This involves namely the question of interpretation and construction of various clauses in the trust deeds and their regulations and also in the manner the accounting procedure was undertaken as to the deductions – as the defendants claimed that the deductions were merely an accounting procedure. There is also the issue of the validity of reg. 5(2) and 7(1)(c) of the 1976 deeds *vis-a-vis* the EPF Act 1991 and its predecessor the 1951 Act.

As to the balance of convenience, I have no doubt that D1 & D2 would in any event be able to meet their obligations. The sum of RM50 million compared to D1 & D2's audited annual income is a small sum. But that is not really the point in this case. The issue here is that the plaintiffs are claiming against the fund and the trustees. The trustees have no control or authority over funds which have not been paid into the funds, and are still in the hands of D1 & D2. So in my view, it is the assets within the funds that matter. As to the undertaking in exh. M, this I think must be seen in the light of cl. 30(1) and cl. 31(1) of the 1968 and 1976 deeds respectively, which say that the former members (plaintiffs included) have rights only against the funds and the trustees. There is also no undertaking given by the trustees. I think it is also important that the trustees give similar undertaking. It is also to be seen from exh. N that D1 & D2 did not appreciate the concern of the plaintiffs' claim. In my view this may be explained away by looking at the defendants' 1st affidavit in which it was deposed that everything regarding the plaintiffs' claim must be considered only within the 4 corners of the two deeds, 1968 and 1976. Thus the defendants insist that they were correct in their interpretation and construction of cls. 5 and 7 of the deed.

But what is puzzling is D1's & D2's reluctance to give full disclosure of the true state of the funds – its assets and liabilities. In my view the plaintiffs are entitled to such information because by virtue of cl. 30(1) & cl. 31(1) of the 1968 and 1976 deeds – the plaintiffs have no right to sue D1 & D2 directly for the retirement benefits without also naming the fund and trustees as a party. If there is a shortfall in the funds to meet the retirement benefits obligation then it is the trustees who have to approach D1 & D2 for the contribution because the trust deeds were entered between D1, D2 and the trustees.

On the appointment of receiver, I will adopt the principle in *Cummins v. Perkins* [1899] 1 Ch. 16. The defendants' counsel argued that in that case judgment was already given. I think it makes no difference. The principle I think is that if the plaintiffs are entitled to be paid from the funds then they can have the injunction and the court may appoint a receiver to give effect to the injunction. In this case the plaintiffs obviously have a right to the funds if the plaintiffs' interpretation and construction of the deeds are correct. This is the triable issue. But I do not believe that the receiver if appointed should be given the same power and authority as the trustees in managing the amount of money from the funds that is to be set aside for the purpose of the plaintiffs' claim. It must be remembered that the trustees are entrusted with the duty of determining who are the members entitled to receive the retirement benefits from the funds and as well as to ascertain the amount of the entitlement and then to distribute them accordingly. The receiver that is to be appointed, in my opinion, is not required to do all these at least not until the plaintiffs have successfully proved their case. This is so because the plaintiffs are former members of the funds and they are not concerned with the current payment out from the funds as long as adequate sum has been set aside to meet their claim if successful.

On the test of Mareva injunction, the defendants' counsel says there is no dissipation of the funds. Payment out to current members upon closure is allowable under the deeds and therefore no dissipation. But the point is, I think, once the whole funds are paid out there is nothing left for the plaintiffs to claim on.

As to the argument that the application/order to be given is oppressive, it relates in my view to the argument that if the order is granted D1 & D2 may not be able to close the funds and distribute the funds to current members upon closure. I do not think there is any basis to this. The plaintiffs' only request is that a certain sum namely RM50 million be preserved/kept in the funds to meet the plaintiffs' claim. The fact that no proper account of the funds is made available either to the court or to the plaintiffs makes it difficult for the court to evaluate the extent of the oppression to the defendants, if any, by granting the order. The plaintiffs are not claiming any extra contribution from D1 & D2 to the funds to meet the claim. The plaintiffs are only claiming the sum which is already supposed to be part of the assets of the funds. In my view if a proper account is taken of the funds and is disclosed to parties and if its shown that the funds at the date of filing of this suit has to its credit a sum in excess of RM50 million then, the defendants are at liberty to distribute the excess to the current members in order to effect the closure of the funds and retain only RM50 million in the funds for the purpose of the plaintiffs' claim.

I am also of the view that if the order is granted there would not be any loss or damage to D1 & D2. If ordered, the sum of RM50 million will be kept in an interest bearing account. In the event the plaintiffs fail in this suit, the money together with the interest thereon shall be credited back to D1 & D2 to be disposed of in any manner they wish according to the terms of the trust deeds.

On the above reasonings the application in encl. (32) is allowed in respect of prayers (1), (2), (3), (7) and (8). Prayers (4) & (6) are refused. There is no necessity to give the receivers the same powers as the trustees.

As to prayer (3) parties, by consent, to attend court on 12 April 2004 for decision on whether or not to proceed with the appointment of the receiver at 2.30pm.